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NO. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL, *Petitioners*,

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioners has been obtained. Counsel for the Respondents has refused his consent.[1]

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-nine affiliated labor organizations with a total membership of approximately fourteen million.

[1]The American Retail Federation has received the consent of both the Petitioners and the Respondents, to file a brief in support of the Respondents.

The questions presented in the instant case are of great importance to the continued vitality of the right to picket, one of the handfull of basic rights that employees have at their disposal during a labor dispute. Briefly stated, these questions are whether a State may utilize its trespass laws to prohibit peaceful picketing addressed to the public, which takes place on a thoroughfare open to the public but within a privately-owned shopping center, without running afoul of the First and Fourteenth Amendments to the Constitution of the United States, the Supremacy Clause, or the preemption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959).

As the *amicus* brief of the Retail Clerks International Association AFL-CIO demonstrates a substantial portion of retail sales take place at shopping centers and their percentage of the total market is on the increase. Thus, the decision of the court below, if sustained, could have a crippling effect on a number of the AFL-CIO's affiliates since it insulates an employer on shopping centers from effective peaceful picketing during a primary labor dispute involving him. For this reason the Federation requests this opportunity to present its views on the instant case to this Court.

ISSUE NOT COVERED BY THE PETITIONERS

In their briet in opposition to the petition, the Respondents argued that picketing, as opposed to handbilling, which seeks to inform the public that a store is non-union, does not enjoy the full protection of the First Amendment (Br. in Op. 21-23). The petitioners have dealt with this contention in their brief but in summary form. The main burden of our *amicus* brief is therefore devoted to a full exploration of this point.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out at pp. 2-3, 57-60 of The Petitioners' brief.

The interest of the AFL-CIO is set out at pp. v-vi of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE UTILIZATION OF STATE TRESPASS LAWS TO SUPPRESS OTHERWISE PROTECTED PEACEFUL PICKETING WHICH TAKES PLACE ON A PRIVATELY OWNED THOROUGHFARE OPEN TO THE PUBLIC

In the instant case the Pennsylvania courts have used the State's trespass laws to create a *cordon sanitaire* around the place of business of an employer subject to the National Labor Relations Act, 61 Stat. 136, 73 Stat 514, 29 U.S.C. 151 *et seq.* which immunizes that employer from peaceful picketing and handbilling, on thoroughfares which are within the protected area and are otherwise open to the public, designed to inform the public of the Union's position in a labor dispute with him.[1] This result is beyond the State's power to accomplish.

1. Viewing the instant case in light of the fact that the picketing grew out of a labor dispute the result reached below is in conflict with the NLRA, the "comprehensive regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce", *Nash* v. *Florida Industrial Commission,* — U.S. —, 36 U.S. Law Week 4046, 4047 (December 5, 1967), *Hill* v. *Florida,* 325 U. S. 538 (1945).[2] For the Act, as authorita-

[1] The trial court while willing to outlaw handbilling on the shopping center refrained from doing so because respondent did not request that relief (A. 98) ("A" references are to the record Appendix prepared for this Court). This happenstance does not change the fact that the rationale adopted by the court below would permit an injunction prohibiting handbilling if one were requested. This being so we believe that the statement in the text is accurate.

[2] The arguments based on the Act are fully developed by the Union. We agree with the points made by the Union and incorporate them by reference here. For this reason we deal with this aspect of the case in brief compass.

tively construed by the Board, permits the dissemination of information by a union on a privately owned thoroughfare open to the public, *Marshall Field & Co.*, 98 NLRB 88, 93 (1952) *enforced as modified* 200 F.2d 375, 380 (7th Cir., 1953). Indeed, as a general proposition, the Act protects the right of unions and union members to circulate their views, in a manner appropriate to the time and the location, upon property otherwise open to them without interference from the person holding title to that property, *see e.g. Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 796, 802 (1945), *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 131 (2nd Cir., 1963), *certiorari denied* 376 U. S. 951. We, of course, recognize that under *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) unions do not have a right of access to privately owned property, closed to the public at large, unless they can show that alternative methods of communication are inadequate. But *Babcock & Wilcox* does not detract from our Supremacy Clause argument for it has no relevance here. This is so because there can be no doubt that the shopping center's thoroughfares were open to the picketing union members as long as they refrained from attempting to communicate their views on the Union's dispute with Weis. Thus here, as opposed to *Babcock & Wilcox,* the privilege to refuse access in the first instance to a group (there non-employees) is not involved, rather the Respondents seek to regulate the conduct of those who have a general invitation to come on the property.

Alternatively, the result reached below is beyond the State's power under the preemption doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). In *Garmon,* the Court stated, *Id.* at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or

> constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes."

Given *Marshall Field, Republic Aviation* and *Babcock & Wilcox,* there can be no doubt that the picketing here is, at the least, arguably protected. Moreover, these cases show that the location at which informational activity takes place is of central, and not merely peripheral, concern under the Act, and that the standards of decision relating to such activity are not rigidly attuned to those of trespass. Finally, there can be no doubt that the overall regulation of picketing is a vital central concern of the Federal regulatory scheme, *see Garner* v. *Teamsters,* 346 U.S. 485 (1954). Thus all the classic ingredients of preemption are present here and none are absent.

2. Looked at more broadly, and without specific reference to the fact that conduct which the Act regulates is involved here, the result reached below is beyond the State's power because of the First and Fourteenth Amendments. The remainder of our brief will be devoted to a consideration of why this is so.[3] Our basic position is that a State, on its own, or at the behest of a private citizen, cannot consistent with the First and Fourteenth Amendments, close

[3] The Union's brief considers this issue and we agree with the views expressed there. The following is an attempt to analyze the point more extensively than was possible in that brief, given the number of complex issues it was incumbent upon the Union to discuss.

an area having the characteristics of a public thoroughfare to either peaceful picketing or handbilling designed to inform the public about a matter of general interest, on the bare ground that the holder of the title to that thoroughfare, or his lessee, has the unfettered discretion to control informational activity upon it because of his property rights.

The proposition that a public body cannot justify an abridgement of peaceful informational activity on the streets by arguments based on the fact that it holds title to them finds its roots in *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) where Mr. Justice Roberts stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Then, in *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939) this Court in an opinion by Mr. Justice Roberts, and in reliance on *Hague* and *Lovell* v. *Griffin*, 303 U. S. 444 (1938), held four city ordinances, which regulated the distribution of handbills, unconstitutional.[4] In its opinion the Court stated (308 U. S. at 163):

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to dis-

[4] In the context of the instant case it should be noted that the Milwaukee, Wisconsin Ordinance in question there was applied to a union member "who stood in the street in front of a meat-market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat-market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it", (308 U.S. at 155).

> tribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Finally, in *Jamison* v. *Texas*, 318 U. S. 412, 415-416 (1943) the Court summed up the learning of the prior cases in the following terms:

> "The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. It relies primarily on Davis v. Massachusetts, 167 U. S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. Hague v. Committee for Industrial Organization, 307 U. S. 496, 514-516. Of course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public. Cox v. New Hampshire, 312 U. S. 569, 574. They may punish conduct on the streets which is in violation of a valid law. Chaplinsky v. New Hampshire, 315 U. S. 568. But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. Hague v. Committee for Industrial Organization, 307 U. S. 496, supra; Schneider v. Irvington, 308 U. S. 147. Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

In short, since the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value, Ex Parte Jackson, 96 U.S. 727, 733'', *Lovell*, 303 U.S.

at 452, only narrowly drawn regulations which are directed to such matters as the safety and convenience of the traveling public, are permissible when the State attempts to deal with the circulation of views on the streets. Where First Amendment rights are at stake common law property concepts, which would afford the State complete and absolute dominion over the streets, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized urban society," *Kermarec* v. *Compagne Generale Transatlantique*, 358 U.S. 625, 631-632 (1958). Thus, like the common law of libel, property concepts must, in appropriate instances, give way to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open", *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail that debate to a substantial degree. It would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors. *Cf. Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Talley* v. *California*, 362 U.S. 60 (1960). Moreover as this Court explicitly recognized in *Schneider*, *see* pp. 5-6 *supra*, the evil which would result is not abated by the fact that the State might choose to close only some streets to the circulation of information. The reasons are obvious from the facts of the instant case. Here, the Union was interested in reaching those who intended to trade with Weis. The natural and effective place to do so was on the thorough-

fare in front of Weis's store. The attempt to communicate with the limited class which the Union wished to reach could be frustrated by a variety of factors if that location was declared off limits. It could be frustrated by the fact that those interested in trading with Weis could only be identified as they approached the shopping center, and if they came by automobile, as is likely, their mode of conveyance would insulate them from the Union's message if that message was delivered at the outskirts of the center. It could be frustrated by the fact that the Union's limited manpower and resources would be dissipated if it attempted to reach the entire community in order to make sure that it reached the limited class to whom its message was relevant. It could be frustrated by the fact that a message remote in time and place tends to be drowned in the torrent of information the public receives every day. Indeed, the argument that the fact that other areas are left open to free speech should be taken into account as a justification for restricting speech elsewhere quickly reduces to an absurdity which justifies every abridgement. For every state and subdivision has power over only a limited geographic area, and unless all act in concert there is always an area, somewhere, open for the circulation of ideas.

The principles developed in *Hague, Schneider* and *Jamison* control where the State and a private party act in concert to regulate the dissemination of views on a public thoroughfare to which the private party has title. For in *Marsh* v. *Alabama*, 326 U. S. 501, 503-504, 505-506 (1946) which dealt with the power of a state to apply its trespass law to prohibit handbilling on a street in a company owned town this Court stated:

> "[A]ccording to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. There is nothing to stop highway traffic from coming onto the business block

and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

* * * *

"It is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by the state statute, to abridge [First Amendment] freedoms. We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. National Labor Relations Bd. 324 U. S. 793, 796, 802."

Marsh cannot be truncated by restricting its application to company towns. It has a broader more principled rationale: when a privately owned facility, which parallels a facility normally provided by a public body, is opened to the public in general the members of the public who come on the property carry with them the right to engage in activity which is protected by the Constitution. The State and the owner cannot combine to limit free access to that facility by subjecting such access to unconstitutional conditions which the State acting alone could not exact. Thus *Marsh* must be viewed as the natural development of, and safeguard for, the principles of *Hague, Schneider* and *Jamison*, for absent that decision the historical right to use the

streets to circulate views could be subverted by changes in patterns of land development which leave title to street frontage in the abutting property owner. Indeed the record here, and the background material developed in the *amicus* brief of the Retail Clerks International Association AFL-CIO, demonstrate that the modern shopping center is the exact equivalent, in the sprawling urban areas our motorized society encourages, of the business block in a privately owned company town, and, in turn, of the block of stores fronting on a public street. Therefore, the critical point in the instant case, in light of *Marsh*, is that the streets and sidewalks of the shopping center are open to motorists and pedestrians without a pass. The thoroughfares of the center are open to the community at large without the necessity of securing prior approval for entry. This being so, people on the sidewalks and streets of the shopping center, no less than people on other sidewalks and streets open to the public generally, carry with them "the constitutional right to express [their] views in an orderly fashion", *Jamison*, 318 U. S. at 416.

The fact relied on by the court below (A. 105) that the private party having title to the property here, at one and the same time, allows the public to use the driveways and walkways he provides without prior permission and also states that "No trespassing or soliciting is allowed" is of no moment against the right to exercise First Amendment rights. For the owner of the business block in *Marsh* had posted his property, a point this Court explicitly noted and found unavailing to the owner in making its decision. Nor, as the court below apparently supposed (A. 104-106) does the extent of the constitutional right to disseminate information on the streets and sidewalks turn on the owner's supposed intent, in inviting the public at large on to his

property, to restrict his invitation to "those who might benefit [his] enterprise". His intent does not control, rather it is the extent to which he has opened his property which controls. The property owner in *Marsh*, by having the appellant there arrested, demonstrated an intent to clear the business block of certain pedestrians who failed to make use of the commercial facilities it contained. But *Marsh* was decided in favor of the right of free speech. Finally, it makes no differences that the effect of the injunction here was to cordon off from picketing an area of 400 to 500 feet around a store rather than four to five miles or 400 to 500 miles. In *Marsh* there was a public highway 30 feet from the business block but that did not suffice to legalize the abridgement of free speech there, *see* pp. 7-8, *supra*.

3. This case involves dissemination of views to the general public through placards held aloft, i.e. picketing, and the cases just discussed dealt with the circulation of handbills. In its brief in opposition to the petition Respondents therefore argued that a picket sign directing a message to the general public is not the equivalent of a handbill and that pickets, carrying such signs, can be regulated by trespass laws even if handbillers with the same message can not (Br. in Op. 21-23). This argument is untenable. Handbilling and picketing on thoroughfares open to the public to inform the public about a matter of general interest are both immune from abridgements premised on the theory that the title holder of the street may, through the use of a trespass law, pick and choose the views which will be disseminated on that thoroughfare.

Recognition of one simple principle will cut away all the confusion which has grown up around the constitutional status of picketing, and will place every decision by this Court on the subject since *Thornhill* v. *Alabama*, 310 U.S.

88 (1939) in a coherent and consistent pattern. As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded other forms of circulating views, such as handbilling.

The test in *Thornhill,* 310 U.S. at 104-105, that an abridgement of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by Justice Holmes on behalf of this Court in *Schenck* v. *United States,* 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Cf. Dennis* v. *United States,* 341 U.S. 494, 510 (1951). Properly understood, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs one iota from the test enunciated in that decision.[5]

Put most simply, as has been stated by Professor Francis E. Jones, Jr., of Southern California Law School: "Picketing, like any other speech, is protected by the Constitution—as a *means;* however, like other speech, it will

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[5] We naturally do not concede that every picketing case was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our contention that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

not be protected when used for the purpose of accomplishing an unlawful *end.*''[6]

The pivotal decision is *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1942). There this Court, in a unanimous opinion, upheld a state court injunction against peaceful picketing aimed at inducing wholesale distributors to agree with a union not to sell ice to nonunion peddlers, in violation of a state statute forbidding combinations in restraint of trade. The validity of state antitrust legislation being recognized, it was an easy step to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." *Id.* at 502. The gang leader's oral remarks to his henchman may be speech in the truest sense, but if they are in furtherance of a conspiracy to rob a bank, they are not immune from the regulatory power of government. See, *e.g.*, *Fox* v. *Washington*, 236 U.S. 273, 277 (1915).

In several of the cases where a ban on peaceful picketing has been upheld, the "unlawful end" or "substantive evil"

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[6] F. E. Jones, *Free Speech: Pickets on the Grass, Alas!—Admist Confusion, A Consistent Principle*, 29 So. Calif. L. Rev. 137, 157 (1956). (Emphasis in the original.) *See also* E. A. Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 Univ. Pa. L. Rev. 995, 1028 (1954).

In certain situations picketing might constitute a ''clear and present danger'' that a ''substantive evil'' will be accomplished, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is a function of the time and place and specificity of the message conveyed by the picketing, including any special signification attached to it by prearrangement among some particular group, and not something inherent in the nature of the conduct itself. Any other kind of speech or advocacy likewise may or may not represent a clear and present danger which can be declared unlawful, depending on its tendency to generate concrete action. Compare *Dennis* v. *United States*, *supra*, 341 U.S. 494, with *Yates* v. *United States*, 354 U.S. 298 (1957).

proscribed by governmental authority was the "exertion of *concerted* pressure" by employees, typically acting subject to union sanctions or loyalties, to compel a person to do an act which a constitutionally permissible public policy had declared should be left to his free choice. *See Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 726 (1942). (Emphasis supplied.) In certain cases the act which the union wanted someone to do was itself unlawful, as in *Giboney;* in these instances even a direct, uncoercive inducement of the act could have been prohibited. But where the act sought was lawful, the most this Court has ever held was that a person could constitutionally be insulated, in furtherance of a valid public policy, from the coercion brought to bear directly by a *combination* of employees, ordinarily acting pursuant to organizational rules and discipline. The Court has never held or suggested that it would be constitutional to prohibit anyone from advising individual members of the consuming public that an employer, or his employees, had refused or failed to do some lawful act, and requesting those individual consumers voluntarily to refrain from patronizing that employer or his product.

In addition to *Giboney,* where the wholesale ice distributors would have violated the Texas antitrust law by acceding to the union's demands, other cases in which picketing bans were upheld where, as the Court viewed the facts, even voluntary compliance with the union's desires would have been unlawful, include *Building Service Employees Local 262* v. *Gazzam,* 339 U.S. 532 (1950) (picketing to have employer force his employees to join a union, contrary to state statute forbidding such employer coercion); *Plumbers Local 10* v. *Graham,* 345 U.S. 192 (1953) (picketing to have employer require union membership as a condition of employment, in violation of state right-to-work law); *Teamsters Local 695* v. *Vogt,* 354 U.S. 284 (1957) (picketing to have employer force his employees to join a

union); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950) (picketing to have employer practice racial discrimination in hiring, contrary to state policy).[7]

Cases where the person who was the target of the picketing could lawfully have done the act requested, but where valid state policy decreed his decision should not be coerced by the concerted pressures of organized employees, are represented by *Teamsters Local 309* v. *Hanke*, 339 U.S. 470 (1950) (picketing to enlist union deliverymen and union patrons to force self-employer to abide by union working conditions); and the "secondary boycott" cases, *Ritter's Cafe*, *supra*, 315 U.S. 722, *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675; and *IBEW Local 501* v. *National Labor Relations Board*, 341 U.S. 694 (1951). In each of the last three cases a labor organization used picketing either as "a signal in the nature of an order to the members of the affiliated unions," 341 U.S. at 678, or as a "bare instigation," 341 U.S. at 701, 704, that organized employees leave their jobs or refuse to make deliveries, in order to force a supposed "neutral" to cease doing business with the primary employer.[8] We do not necessarily agree with the conclusions reached in all these decisions, but for the purposes of the

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[7] Sound as it is as an abstract proposition, the "unlawful purpose" doctrine can create a serious threat to First Amendment rights in actual practice, as members of this Court and academic observers have been quick to point out. See, *e.g.*, Douglas, J., dissenting in *Teamster Local 695* v. *Vogt*, *supra*, 354 U.S. at 296 ("state court's characterization of the picketers' 'purpose' had been made well-nigh conclusive"); Cox, *Strikes, Picketing and the Constitution*, 4, Vand. L. Rev. 475, 598-599, n. 97 (1961) ("[w]hat does give cause for great concern is the Court's astuteness in finding for recent injunctions some basis in a supposed state policy which will furnish a constitutional foundation").

[8] The rationales of "signal picketing" and "secondary boycott" were not expressly utilized in *Ritter's Cafe*, but they fit the facts as seen through the eyes of the Court.

instant case we need not quarrel with them. The crucial factor in every instance was that someone had a special interest of sufficient value, his status as an independent self-employer, or his status as a putative "neutral", that this Court felt the state could, consistent with the Constitution, protect him against being forced to relinquish it by a combination of employees responding to group discipline.

On the other hand, whenever this Court has dealt with peaceful picketing whose end was the doing of a lawful act by the target of the picketing, uncoerced by organized employees or a group acting in concert, the Court has consistently sustained the constitutional right of the picketers "to advise customers and prospective customers . . . and thereby to induce such customers not to patronize." *Thornhill,* 310 U.S. at 89; *AFL* v. *Swing,* 312 U.S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U.S. 769 (1942); *Cafeteria Employees Local 302* v. *Angelos,* 320 U.S. 293 (1943); *Teamsters Local 795* v. *Newell,* 356 U.S. 341 (1957) *reversing per curiam* 181 Kan. 898, 317 P. 2d 817.

This distinction makes for a rational and practicable demarcation line. If picketing is used to instigate mass action by organzed employees to make someone do a certain act, there may be occasions when society can constitutionally prohibit the mass action and the picketing or other "signal" used to set it in motion, *see Denver Building and Construction Trades Council, supra,* 341 U.S. at 678, even though the act sought is lawful in itself, and direct, uncoercive solicitation of it would be constitutionally protected free speech. But if the picketing is used simply to publicize the facts of a labor dispute and to request the voluntary support of individual consumers, acting wholly on their own without the pressure of group discipline, then such picketing is free speech as much as any other form of expression,

and cannot constitutionally be forbidden, as long as the act which the picketing seeks to bring about is itself a lawful one.

4. The short of it is this: both peaceful picketing and handbilling directed to the general public to publicize a union's position about a labor dispute are examples of expression protected by the First Amendment, and looked at in another dimension, both are examples of conduct which is inextricably bound up with the expression of views. Therefore attempts to limit the location at which such picketing or handbilling may take place must meet the standard developed in *Hague, Schneider, Jamison* and *Marsh* and recently restated in *Mine Workers* v. *Illinois Bar Association,* —U.S.—, 36 U.S. Law Week 4048, 4049, (December 5, 1967) in the following terms:

> The First Amendment would, . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. Schneider v. State, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940)."

It is plain from what we have shown on pp. 4-11 *supra* that the application of the Pennsylvania trespass law here cannot be sustained under this standard.

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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